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**SENATE BILL 5438**

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**State of Washington**

**66th Legislature**

**2019 Regular Session**

**By** Senators McCoy, Saldaña, Conway, Van De Wege, Keiser, Rolfes, Wellman, Dhingra, Hasegawa, and Kuderer; by request of Employment Security Department

Read first time 01/21/19. Referred to Committee on Labor & Commerce.

1 AN ACT Relating to the H-2A temporary agricultural program;  
2 adding a new chapter to Title 50 RCW; and providing an effective  
3 date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature finds that the  
6 agricultural industry in the state of Washington employs about one  
7 hundred thousand workers per year and brings more than seven billion  
8 dollars of economic activity to our state. This industry and its  
9 workers are a vital part of Washington's role in the global economy.  
10 The legislature further finds the number of the H-2A temporary  
11 agricultural workers coming into the state of Washington to harvest  
12 crops has grown by more than one thousand percent since 2007 and the  
13 funding provided by the federal government is insufficient to  
14 adequately ensure the protection of workers and growers. The  
15 legislature also finds the need to ensure this growth does not have  
16 an adverse impact on the domestic agricultural labor force.

17 The legislature declares it to be in the public interest to  
18 clarify the state's role in the H-2A temporary agricultural program  
19 to provide adequate protections for foreign and domestic workers and  
20 provide education and outreach opportunities to help growers maintain  
21 the stable workforce they need.

1        NEW SECTION.    **Sec. 2.**    The definitions in this section apply  
2 throughout this chapter unless the context clearly requires  
3 otherwise.

4        (1) "Commissioner" means the commissioner of the employment  
5 security department.

6        (2) "Department" means the employment security department.

7        (3) "Employer" has the same meaning as in 20 C.F.R. Sec. 655.103.  
8 "Employer" also includes a "fixed-site employer," as defined in 20  
9 C.F.R. Sec. 655.103, and an employer in a "joint employment"  
10 relationship, as defined in 20 C.F.R. Sec. 655.103.

11        (4) "Field check" means an unannounced inspection and audit of an  
12 employer to determine and document whether the employer is providing  
13 wages, hours, and working and housing conditions as specified in the  
14 employer's approved H-2A application.

15        (5) "Field visit" means a scheduled visit to an employer's  
16 premises where H-2A workers work, live, and gather to discuss  
17 employment services and other employment-related programs with  
18 workers.

19        (6) "H-2A application" means an agricultural food processing  
20 clearance order form ETA 790 that describes the material terms and  
21 conditions of employment and is submitted in connection with a future  
22 application for temporary employment certification for H-2A workers  
23 to the United States department of labor under 20 C.F.R. Part 655, as  
24 amended.

25        (7) "H-2A worker" means any temporary foreign worker who is  
26 lawfully present in the United States to perform agricultural labor  
27 or services of a temporary or seasonal nature pursuant to Title 8  
28 U.S.C. Sec. 1101(a)(15)(H)(ii)(a) of the immigration and nationality  
29 act, as amended.

30        (8) "Office" means the office of H-2A compliance and farm labor  
31 established in section 3 of this act.

32        NEW SECTION.    **Sec. 3.**    (1) The office of H-2A compliance and farm  
33 labor is established within the department.

34        (2) The office has the following duties:

35        (a) Conduct field checks and field visits. When conducting a  
36 field check, the office shall coordinate, to the extent possible,  
37 with the department of labor and industries, department of health,  
38 and department of agriculture in order to limit disruption to  
39 agricultural employers and efficiently use government resources;

1 (b) Conduct training and outreach activities to employers using  
2 the H-2A temporary agricultural program to help increase awareness of  
3 law and regulations associated with the program and increase  
4 compliance; and

5 (c) Collect the fee established in section 4 of this act.

6 NEW SECTION. **Sec. 4.** (1) An employer must submit an H-2A  
7 application in the manner and on a form prescribed by the department.  
8 The H-2A application is not subject to chapter 50.13 RCW.

9 (2) An employer must pay a fee for each H-2A application  
10 submitted to the department and pay an additional fee per requested  
11 H-2A worker.

12 (a) The department shall:

13 (i) Formulate and adopt rules setting forth the amount of the  
14 fees it charges;

15 (ii) Annually readjust the fees through the formal rule-making  
16 process based on:

17 (A) An analysis of the costs incurred by the office to administer  
18 the H-2A program; and

19 (B) The amount of funds allocated by the federal government to  
20 administer the H-2A program;

21 (iii) Adopt the rule setting the annual fees by October 31st of  
22 each year, and the rule must stay in effect for the whole next  
23 calendar year; and

24 (iv) Hold the rule-making hearing to set the fees for calendar  
25 year 2020 during the month of September 2019.

26 (b) The structure of the fee must include:

27 (i) A scale with varied per worker fees at certain breakpoints to  
28 show consideration for economics of scale for larger requests;

29 (ii) Provisions for discounted rates for employers who have a  
30 track record of compliance with the requirements of the H-2A program;  
31 and

32 (iii) Other factors as determined by the department.

33 (c) The department may not set fees that are expected to result  
34 in revenues in any year in excess of the projected difference between  
35 the federal funds allocated and the costs to administer the H-2A  
36 program.

37 (3) The department shall make the most effective and efficient  
38 use of the fees collected under this section.

1        NEW SECTION.    **Sec. 5.**    The department may not process an H-2A  
2 application if the:

3        (1) Employer does not pay the fees established in section 4 of  
4 this act;

5        (2) Employer refuses to agree to be subject to field checks and  
6 field visits; or

7        (3) Department discontinued services to the employer pursuant to  
8 20 C.F.R. Part 658, Subpart F and that discontinuation remains in  
9 effect.

10       NEW SECTION.    **Sec. 6.**    (1) The commissioner shall appoint an  
11 advisory committee to review issues and topics of interest related to  
12 this chapter.

13        (2) The committee is composed of nine members:

14        (a) Four members representing agricultural workers' interests in  
15 the H-2A temporary agricultural program: One of whom shall be a  
16 farmworker; and all of whom shall be appointed from a list of at  
17 least four names submitted by a recognized statewide organization of  
18 workers;

19        (b) Four members representing agricultural employers: One of whom  
20 shall be an agricultural employer; and all of whom shall be appointed  
21 from a list of at least four names submitted by a recognized  
22 statewide organization of agricultural employers; and

23        (c) One ex officio member, without a vote, shall represent the  
24 department and serve as the chair.

25        (3) The committee shall provide comment on department rule  
26 making, policies, implementation of this chapter, and initiatives,  
27 and study issues the committee determines require consideration.

28        (4) The committee shall submit a report to the governor and the  
29 legislature by October 31, 2021, that identifies and recommends  
30 approaches to increase the recruitment and hiring of domestic workers  
31 in agricultural employment in Washington. If deemed advisable by the  
32 committee, the report must include recommended changes to state law  
33 that would lead to increased recruitment and hiring of domestic  
34 workers in agricultural employment in Washington.

35        (5) The committee members shall serve without compensation, but  
36 are entitled to reimbursement for travel expenses as provided in RCW  
37 43.03.050 and 43.03.060. The committee may utilize department  
38 personnel and facilities as it needs, without charge. All committee  
39 expenses must be paid by the H-2A enforcement account.

1        NEW SECTION.    **Sec. 7.**    The H-2A enforcement account is created in  
2 the custody of the state treasurer. All receipts from section 4(2) of  
3 this act must be deposited into the account. Expenditures from the  
4 account may be used only for the purposes of this act and for  
5 purposes of surveying employers and workers using the agricultural  
6 prevailing wage survey and agricultural employment practice survey.  
7 Only the commissioner or the commissioner's designee may authorize  
8 expenditures from the account. The account is subject to allotment  
9 procedures under chapter 43.88 RCW, but an appropriation is not  
10 required for expenditures.

11        NEW SECTION.    **Sec. 8.**    Sections 4, 5, and 7 of this act take  
12 effect January 1, 2020.

13        NEW SECTION.    **Sec. 9.**    If any part of this act is found to be in  
14 conflict with federal requirements that are a prescribed condition to  
15 the allocation of federal funds to the state or the eligibility of  
16 employers in this state for federal unemployment tax credits, the  
17 conflicting part of this act is inoperative solely to the extent of  
18 the conflict, and the finding or determination does not affect the  
19 operation of the remainder of this act. Rules adopted under this act  
20 must meet federal requirements that are a necessary condition to the  
21 receipt of federal funds by the state or the granting of federal  
22 unemployment tax credits to employers in this state.

23        NEW SECTION.    **Sec. 10.**    If any provision of this act or its  
24 application to any person or circumstance is held invalid, the  
25 remainder of the act or the application of the provision to other  
26 persons or circumstances is not affected.

27        NEW SECTION.    **Sec. 11.**    Sections 1 through 9 of this act  
28 constitute a new chapter in Title 50 RCW.

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